Appendix 1

UNPUBLISHED OPINION OF THE COURT OF APPEAL

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(Cite as: 2006 WL 2054447 (Cal.App. 2 Dist.))

Court of Appeal, Second District,
Division 8.
The PEOPLE, Plaintiff and Respondent,
v.
Jamie Michael ESCALERA, Defendant and Appellant.
No. B175315.
(Los Angeles County Super. Ct. No. SA046654).

July 25, 2006.

APPEAL from a judgment of the Superior Court of Los Angeles County. Antonio Barreto, Jr., Judge. Affirmed.

Law Office of William J. Kopeny & Associates and William J. Kopeny for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Michael R. Johnsen, Supervising Deputy Attorney General, and Jonathan J. Kline, Deputy Attorney General, for Plaintiff and Respondent.

COOPER, P.J.

***1** Appellant, Jamie Michael Escalara, was charged with the premeditated murder of Donald Luciano, and the attempted

premeditated murder of Amber Johnson, with allegations of firearm use enhancements on both counts and an enhancement for inflicting great bodily injury on Johnson. Appellant also was charged with carrying a concealed firearm as a convicted felon. The jury convicted him of second degree murder of Luciano and attempted voluntary manslaughter of Johnson, as well as the firearm charge, and found true the three enhancements. Appellant received a sentence of 40 years to life for the murder and the firearm enhancement under Penal Code section 12022.53. (Undesignated section references are to that code.) A 10-year sentence for the attempted manslaughter and its enhancements was imposed to run concurrently, and the sentence for carrying a firearm was stayed under Penal Code section 654.

Appellant contends that the prosecution deprived him of due process under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) and its progeny, by failing to disclose to the defense during trial that the victim-witness Johnson had recently been convicted of misdemeanor infliction of corporal abuse on a cohabitant (§ 273.5), and that there was a warrant outstanding for her arrest, for failure to appear at a probation hearing. We conclude that this information was not "material either to guilt or to punishment" (*Brady,* at p. 87), and so there was no due process violation.

FACTS

Viewed in accordance with the governing rules of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence at trial showed that in the late summer of 2002 Luciano, recently paroled, was a tattoo artist. He worked at a Hollywood parlor until being hospitalized for a drug overdose. While he was gone, another tattoo artist, Houston Hamrick, worked in his place. When Luciano's friend Scott Bradshaw

retrieved Luciano's equipment from the parlor, a special tattoo machine was missing. This device bore personal as well as professional significance to Luciano. He came to believe--accurately--that Hamrick had taken it.

In September 2002, Luciano became acquainted with Johnson, a Fresno resident whom he tattooed when she visited Hollywood. Johnson stayed the night at Luciano's residence, and she returned to Los Angeles around September 30. On that day, she and Luciano, together with Bradshaw, visited tattoo parlors in Venice beach. There Luciano acquired Hamrick's phone number, then called him. He asked Hamrick for a tattoo appointment, as a ruse to see whether he had Luciano's machine. Hamrick agreed to a meeting at his apartment that night. Not desiring to receive Luciano alone, Hamrick asked his friend Noah Elder to come too.

Accompanied by Johnson and Bradshaw, Luciano arrived at Hamrick's Venice apartment building at about 10:00 p.m. Bradshaw remained in his truck and napped. Outside the building, Luciano and Johnson encountered Hamrick and Elder, and also appellant and his girlfriend Lisa Marquez, whom Elder had invited to accompany them. The group spoke, and then walked upstairs to Hamrick's apartment. Hamrick now recognized Luciano as the person he had replaced in Hollywood, and became concerned, having taken the machine.

***2** The shootings occurred inside Hamrick's apartment, which had beds in the main room. Johnson was one of four eyewitnesses who testified about the shootings, the others being Hamrick, Marquez, and appellant. Johnson was seated on a love seat throughout, except when she was shot. According to Johnson, Hamrick first put his pit bull outside on a balcony, after telling her it would bite if she petted it. Luciano then told

Hamrick he wanted to see his tattoo equipment. After looking at it, Luciano picked up an object and hit Hamrick in the head with it. To Johnson, the object did not appear to be a gun. Hamrick shouted that the dog should be let in.

Luciano and Hamrick fought. The dog bit at them. Johnson moved toward the front door, and appellant grabbed her arm, yelling that he would shoot her if Luciano did not stop. Appellant pulled out an automatic handgun, and shot Johnson in the chest. According to Johnson, Luciano then came toward appellant, and appellant began shooting at him. He fell, and crawled. Appellant continued to fire at him, and he stopped. Appellant returned to Johnson, and held the gun six inches from her face. She pleaded that she had children. Appellant then left, together with Marquez and Elder. Hamrick followed, holding the dog.

After checking Luciano's pulse, Johnson too went outside. She told Bradshaw that Luciano was dead, and she collapsed. Paramedics took her to UCLA Medical Center. Her lung had collapsed, and she had bled heavily. Johnson remained hospitalized for five or six days. Hospitalized again for a lung infection a few days later, Johnson identified appellant, from a six-pack shown her by Los Angeles Police detectives, as the man who had shot her and Luciano.

Los Angeles Police officers recovered seven discharged 9 millimeter shells from Hamrick's apartment. An autopsy of Luciano disclosed five gunshot wounds, four of a fatal nature. Two bullets had entered his head through his cheeks, two others passed through his lungs, while the fifth had struck a forearm.

Hamrick also testified for the prosecution, and his account of the shootings differed from Johnson's in various respects. According to Hamrick, Luciano initially attacked him in the kitchen from behind, grabbing him in a hug while grazing his head with the dark object. Hamrick dragged Luciano toward the living room, and dropped to the floor in an attempt to evade Luciano's grasp. He testified that one of the women (presumably Marquez) called for the dog to be let out, and Luciano responded that if it were, "Everyone f__cking dies."

At this point, appellant, holding a gun, called out "Freeze. Get on the ground." Johnson ran toward appellant, in the same direction as the door. Hamrick heard a shot, and Johnson sat down on the loveseat, wounded. Luciano then left Hamrick and rushed toward appellant, who jumped on a bed and moved back. Luciano continued toward appellant, on the bed, and appellant fired three or four shots at him, Struck, Luciano fell down, but then got back up and again pursued appellant, who got onto another bed. Luciano did the same, and when he closed on appellant, appellant fired another three to four shots. Luciano again fell to the floor, appearing seriously wounded. According to Hamrick, appellant then went to Luciano, who was face down, and fired a shot into the back of his head.

*3 Hamrick testified that appellant then put the gun to Johnson's chest. Hamrick told appellant not to shoot her, and she also so pleaded, saying that she had children. Everyone but Johnson and Luciano then left the apartment, Hamrick departing last, with his dog.

As directed by Elder, Hamrick got into appellant's car, with Elder, Marquez, and appellant. They drove first to appellant's westside residence, then to a house in Palmdale, which appellant referred to as "Pop's." (He later testified it was his

stepfather's.) There two older Hispanic men spoke to Hamrick. One referred to appellant as his brother, and the other threatened Hamrick with death if he said anything. Hamrick remained at the house overnight, and appellant then asked him where he wanted to go.

Hamrick said San Diego, and, together with Marquez, the two men picked up Hamrick's girlfriend, Megan Young, and drove there. Along the way, there was some discussion of the shootings, and appellant said it had been a mistake to shoot Johnson. In San Diego, appellant and Marquez gave Hamrick and Young $250, and rented a motel room for them. They remained in the city for two nights, during which period Hamrick told Young about the shootings.

After returning to Los Angeles, Hamrick met with an attorney whom a friend had engaged, and then went with him and Young to a police station. At the attorney's insistence, Hamrick initially declined to speak, and he was arrested. He then changed his mind, for a variety of reasons, and told the police what he had witnessed. His identification of appellant led to appellant's arrest.

Appellant's defense to both shootings was self-defense. Two witnesses from tattoo parlors testified that Luciano had stated--the second time on the day of the shootings--that he intended to kill Hamrick for stealing tattoo machines from him. In addition, Marquez gave her own account of the shootings. She too testified that after the fight began, Hamrick yelled for the dog to be let out, and Luciano said that if anyone moved they all would die. Appellant then went to the door holding a handgun that Marquez had not previously seen, pointed it at Luciano, and told him to release Hamrick. Johnson then rushed

toward appellant. Marquez heard a shot and saw Johnson stumble back.

Luciano ran toward appellant, and as he approached, shots were fired. Luciano and appellant wrestled on a bed, fell off, and mounted another bed. Elder and Hamrick tried to force Luciano off appellant. Marquez moved toward the door, and heard another shot. She saw appellant, with the gun pointed downward, approach Johnson, who pleaded for her life. The group left.

Appellant also testified in his defense. He recounted seeing Luciano holding Hamrick in a headlock in the kitchen, hitting him in the head with a black object. When Hamrick said to let the dog in, Luciano responded with the threat Marquez had described. Appellant believed this death threat, and he "knew" that the black object, which Luciano now pointed at Hamrick's head, was a gun. Appellant then spotted the butt of another gun protruding from one of the beds. He picked it up and pulled the slide. He then pointed it, and told Luciano to let Hamrick go and "get down."

***4** At this point, Johnson stood, and charged in the direction of appellant. He backed up and told her to get back. "And I figured that she had to have a gun, or she was in on this setup or something, or she was going to attack. So I figured the only way was to stop her." And so he fired at her. Appellant testified he believed Johnson was armed, because if not she wouldn't have charged him. Appellant then pointed the gun at Luciano, who also charged him. Appellant backed up and fired several shots, mounting the bed while doing so. Luciano, aggressive and seemingly not hit, grabbed appellant. They fell onto the other bed, Luciano on top. Appellant called for help, to get Luciano off him. Elder and someone else were unable to, but

did enable appellant to pull out a little. He and Luciano stood, wrestling, and the gun "went off." Luciano fell down, and appellant fired no more. He denied further approaching Johnson, or pointing the gun at her. He and the others left. The next day, appellant threw the gun in the ocean.

DISCUSSION

Appellant contends that he suffered a due process violation under *Brady, supra,* 373 U.S. 83, because the prosecution did not disclose, until after the trial, that on August 6, 2003, Johnson had suffered a conviction, by plea, of misdemeanor infliction of corporal injury (hereafter domestic violence) on her boyfriend in Fresno on July 28, and that when she testified at appellant's trial, on November 18 and 19, 2003, a warrant was outstanding for her arrest, for failure to appear at a probation-compliance hearing in her case. This issue was first raised in appellant's unsuccessful motion for new trial, the record of which reflects the following underlying facts.

In pretrial discovery, the prosecution gave the defense Johnson's "rap sheet." It did not, however, reflect her summer 2003 arrest and conviction. Two days after Johnson finished testifying at trial, the prosecutor received a call from the Fresno County Director of Victim Witness Assistance, who told him Johnson had been arrested on a Fresno warrant, for failure to appear. Three days later, the prosecutor told his Fresno counterpart on Johnson's case that she had been under subpoena in the present case extensively. The prosecutor did not inquire about the cause of her prosecution in Fresno.

After the trial concluded on December 5, 2003, the prosecutor inquired of Johnson, who told him that she had pled guilty to a misdemeanor domestic violence charge after being arrested

for throwing a cup of soda on her boyfriend.[1] The prosecutor then obtained another rap sheet, reflecting the conviction. He informed appellant's counsel of it in mid-January 2004, and provided him a copy of the rap sheet a week later.

Brady, supra, 373 U.S. 83, 87, held that "suppression by the prosecution of evidence favorable to an accused on request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Subsequent decisions have eliminated the restriction that the evidence have been requested. (E.g., *U.S. v. Agurs* (1976) 427 U.S. 97, 106-107; *see Strickler v. Greene* (1999) 527 U.S. 263, 280 [noting also that impeachment evidence fully qualifies .]) But there is a requirement of prejudice (*ibid.*); not every failure to disclose favorable evidence engenders a reversible due process violation. The standard of prejudice has evolved through the element of materiality. Its definition, and the ultimate test for a *Brady* violation, is whether "there is a reasonable probability that the suppressed evidence would have produced a different verdict." (*Strickler v. Greene, supra,* 527 U.S. at p. 281; see *id.* at p. 289.) Such a reasonable probability is shown when the withholding of evidence "undermines confidence in the outcome of the trial." (*U.S. v. Bagley* (1985) 473 U.S. 667, 678; accord, *Kyles v. Whitley* (1995) 514 U.S. 419, 484.) The undisclosed information of Johnson's conviction and subsequent arrest was not material under this standard.

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[1] Police reports reflected that the boyfriend had ordered Johnson and a woman friend of hers out of a tattoo parlor, and had begun to approach them when Johnson threw the full soda cup, hitting him in the chest. He then forced the women outside; they pummeled him, and he suffered a facial scratch.

*5 Appellant argues that Johnson's 2003 conviction and arrest warrant, and her underlying conduct, could have impeached her testimony in several ways. First, he asserts, the domestic violence conviction and conduct that produced it involved moral turpitude, and therefore were admissible for general impeachment. (See *People v. Rodriguez* (1992) 5 Cal.App.4th 1398, 1400-1402 [felony conviction under § 273.5 admissible].) Second, appellant claims, Johnson's status as a convicted probationer with an arrest warrant would have implied a motive for her to favor the prosecution in her testimony. Finally, appellant urges, Johnson's violent behavior against her boyfriend would have been admissible and probative of a trait of character, at odds with her description of passivity at Hamrick's apartment, and supportive of appellant's claim that Johnson had charged him, a part of his self-defense claim. (See Evid.Code, § 1103.)

In context, however, these considerations carry little if any weight. First, assuming the conviction qualified for admissibility for impeachment, its nature and background did not strongly cast doubt on Johnson's general veracity. Her personal association with victim Luciano, and her own experience as a victim of appellant's shooting, already provided arguable grounds for challenging her credibility, which the conviction would not have materially enhanced. Second, assuming it did follow from her convicted status, an inclination toward the prosecution could also have been attributed to Johnson from her positions as the prosecution's first witness, the decedent's companion, and appellant's victim. Third, although the facts underlying Johnson's conviction might have supported appellant's position that she was coming at him when he shot her, that would have been completely superfluous. All of the other eyewitnesses testified that Johnson had indeed charged in appellant's direction, and the verdict of attempted

voluntary manslaughter implies that the jury found her shooting an act of imperfect (unreasonable) self-defense, which meant that they too believed she had charged appellant.

Under the evidence and the law, that verdict was the most, if not more than, appellant could properly have received. Moreover, Johnson's aggressiveness could not have further reduced the degree of appellant's homicide of Luciano. There is no reasonable probability that appellant would have obtained a more favorable verdict--i.e., an acquittal by reason of self defense--had the evidence about Johnson been disclosed and admitted.

Put another way, the prosecutor's failure to disclose Johnson's misdemeanor conviction and attendant situation does not undermine confidence in the judgment. Appellant appears to have received every possible doubt to which he might have been entitled. Once more, it is not reasonably probable that the undisclosed evidence could have engendered a more favorable verdict.

DISPOSITION

The judgment is affirmed.

We concur: BOLAND and FLIER, JJ.

Appendix 12

COURT OF APPEAL, SECOND APPELLATE DISTRICT,
DIVISION 8

August 23, 2006

William J. Kopeny
William J. Kopeny & Associates, Inc.
16485 Laguna Canyon Road
Suite 230
Irvine, CA 92618-9233

The People
v.
Jamie M. Escalera aka James Escalera

B175315
Los Angeles County No. SA046654

THE COURT:

Petition for rehearing is denied.

cc: All Counsel
File

Appendix 13

Court of Appeal, Second Appellate District,
Div. 8 - No. B175315
S146340

IN THE SUPREME COURT OF CALIFORNIA

[Filed November 1, 2006]

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JAIME ESCALERA, Defendant and Appellant.

Petition for review DENIED.

GEORGE
Chief Justice

Appendix 14

WEST'S ANNOTATED CALIFORNIA CODES
PENAL CODE
PART 1. OF CRIMES AND PUNISHMENTS
TITLE 16. GENERAL PROVISIONS
§ 664. Attempts; punishment

Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished where no provision is made by law for the punishment of those attempts, as follows:

(a) If the crime attempted is punishable by imprisonment in the state prison, the person guilty of the attempt shall be punished by imprisonment in the state prison for one-half the term of imprisonment prescribed upon a conviction of the offense attempted. However, if the crime attempted is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole. If the crime attempted is any other one in which the maximum sentence is life imprisonment or death, the person guilty of the attempt shall be punished by imprisonment in the state prison for five, seven, or nine years. The additional term provided in this section for attempted willful, deliberate, and premeditated murder shall not be imposed unless the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found to be true by the trier of fact.

(b) If the crime attempted is punishable by imprisonment in a county jail, the person guilty of the attempt shall be punished by imprisonment in a county jail for a term not exceeding one-half the term of imprisonment prescribed upon a conviction of the offense attempted.

(c) If the offense so attempted is punishable by a fine, the offender convicted of that attempt shall be punished by a fine not exceeding one-half the largest fine which may be imposed upon a conviction of the offense attempted.

(d) If a crime is divided into degrees, an attempt to commit the crime may be of any of those degrees, and the punishment for the attempt shall be determined as provided by this section.

(e) Notwithstanding subdivision (a), if attempted murder is committed upon a peace officer or firefighter, as those terms are defined in paragraphs (7) and (9) of subdivision (a) of Section 190.2, a custodial officer, as that term is defined in subdivision (a) of Section 831 or subdivision (a) of Section 831.5, a custody assistant, as that term is defined in subdivision (a) of Section 831.7, or a nonsworn uniformed employee of a sheriff's department whose job entails the care or control of inmates in a detention facility, as defined in subdivision (c) of Section 289.6, and the person who commits the offense knows or reasonably should know that the victim is a peace officer, firefighter, custodial officer, custody assistant, or nonsworn uniformed employee of a sheriff's department engaged in the performance of his or her duties, the person guilty of the attempt shall be punished by imprisonment in the state prison for life with the possibility of parole.

This subdivision shall apply if it is proven that a direct but ineffectual act was committed by one person toward killing another human being and the person committing the act harbored express malice aforethought, namely, a specific intent to unlawfully kill another human being. The Legislature finds and declares that this paragraph is declaratory of existing law.

(f) Notwithstanding subdivision (a), if the elements of subdivision (e) are proven in an attempted murder and it is also charged and admitted or found to be true by the trier of fact that the attempted murder was willful, deliberate, and premeditated, the person guilty of the attempt shall be punished by imprisonment in the state prison for 15 years to life. Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not apply to reduce this minimum term of 15 years in state prison, and the person shall not be released prior to serving 15 years' confinement.

Appendix 17

WEST'S ANNOTATED CALIFORNIA CODES
PENAL CODE
PART 1. OF CRIMES AND PUNISHMENTS
TITLE 8. OF CRIMES AGAINST THE PERSON
CHAPTER 1. HOMICIDE
§ 192. Manslaughter; voluntary, involuntary, and vehicular

Manslaughter is the unlawful killing of a human being without malice. It is of three kinds:

(a) Voluntary--upon a sudden quarrel or heat of passion.

(b) Involuntary--in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. This subdivision shall not apply to acts committed in the driving of a vehicle.

(c) Vehicular--

(1) Except as provided in subdivision (a) of Section 191.5, driving a vehicle in the commission of an unlawful act, not amounting to felony, and with gross negligence; or driving a vehicle in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence.

(2) Driving a vehicle in the commission of an unlawful act, not amounting to felony, but without gross negligence; or driving a vehicle in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence.

(3) Driving a vehicle in connection with a violation of paragraph (3) of subdivision (a) of Section 550, where the

vehicular collision or vehicular accident was knowingly caused for financial gain and proximately resulted in the death of any person. This provision shall not be construed to prevent prosecution of a defendant for the crime of murder.

This section shall not be construed as making any homicide in the driving of a vehicle punishable that is not a proximate result of the commission of an unlawful act, not amounting to felony, or of the commission of a lawful act which might produce death, in an unlawful manner.

"Gross negligence," as used in this section, shall not be construed as prohibiting or precluding a charge of murder under Section 188 upon facts exhibiting wantonness and a conscious disregard for life to support a finding of implied malice, or upon facts showing malice, consistent with the holding of the California Supreme Court in People v. Watson, 30 Cal. 3d 290[1]

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[1] 179 Cal.Rptr. 43, 637 P.2d 279, appeal after remand 198 Cal.Rptr. 26, 150 C.A.3d 313.

Appendix 19

WEST'S ANNOTATED CALIFORNIA CODES
PENAL CODE
PART 1. OF CRIMES AND PUNISHMENTS
TITLE 8. OF CRIMES AGAINST THE PERSON
CHAPTER 1. HOMICIDE
§ 187. Murder defined

(a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

(b) This section shall not apply to any person who commits an act that results in the death of a fetus if any of the following apply:

(1) The act complied with the Therapeutic Abortion Act, Article 2 (commencing with Section 123400) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code.

(2) The act was committed by a holder of a physician's and surgeon's certificate, as defined in the Business and Professions Code, in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not.

(3) The act was solicited, aided, abetted, or consented to by the mother of the fetus.

(c) Subdivision (b) shall not be construed to prohibit the prosecution of any person under any other provision of law.